THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

WRIT PETITION No.4837 OF 2018

ORDER: (per Hon'ble Sri Justice Sanjay Kumar)

The petitioner company is aggrieved by the order dated 12.12.2017 passed by the learned Chief Metropolitan Magistrate, Cyberabad at L.B.Nagar, in Crl.M.P.No.1094 of 2017, in exercise of power under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act').

By order dated 16.02.2018 passed in I.A.No.1 of 2018 filed in this writ petition, this Court took note of the fact that the petitioner company claims rights under a registered lease deed of 2009 whereas the mortgage deed pursuant to which the State Bank of India, the first respondent herein, asserted rights was executed in the year 2011 and opined that there could be no doubt as to the status of the petitioner company being a lawful lessee. This Court also took note of the law laid down by the Supreme Court in Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited[1] to the effect that the bank necessarily has to inform the Magistrate concerned of a lessee being in possession and, as the first respondent bank had not complied with this requirement, granted interim stay of all further proceedings, including execution of the warrant in Crl.M.P.No.1094 of 2017 on the file of the learned Chief Metropolitan Magistrate, Cyberabad at L.B.Nagar.

I.A.No.2 of 2018 was filed by the first respondent bank to vacate the aforestated order.

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[1] (2014) 6 SCC 1

Comprehensive arguments having been advanced by Sri B.Mohan, learned counsel for the petitioner company, and Sri Maruthi Jadhav, learned counsel representing Sri B.S.Prasad, learned counsel for the first respondent bank, the matter is amenable to final disposal at the stage of admission.

As the issue raised before us is limited to the controversy between the petitioner company and the first respondent bank, we see no reason to put the second respondent/borrower on notice or afford it an opportunity of hearing.

At the outset, Sri Maruthi Jadhav, learned counsel, would contend that the petitioner company is not entitled to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution as Section 17(4A) has been inserted in the SARFAESI Act to enable any person claiming tenancy or leasehold rights in a secured asset to approach the jurisdictional Debts Recovery Tribunal. He would therefore argue that in the light of the efficacious alternative remedy provided in the statute, the petitioner company cannot be permitted to maintain this writ petition.

On the other hand, Sri B.Mohan, learned counsel, would point out that the extraordinary jurisdiction of this Court under Article 226 of the Constitution cannot be fettered by any statutory restrictions and that the plenary power of this Court to issue writs under Article 226 of the Constitution forms part of the basic structure of the Constitution, subject to any self-imposed restraint that may be exercised by this Court in a given case.

Though a plethora of case law is relied upon by Sri Maruthi Jadhav, learned counsel, in support of his contention, we are of the opinion that it would essentially be within the discretion of this Court to exercise jurisdiction under Article 226 of the Constitution in a given case or refuse to do so. No straitjacketed restrictions have been laid down, be it by this Court or by the Supreme Court, in this regard and ultimately it is for this Court to decide on the facts of the individual case as to whether it should or should not exercise the power of judicial review vesting in it under Article 226 of the Constitution.

In the case on hand, we are of the opinion that the presence of an alternative remedy under Section 17(4A) of the SARFAESI Act would not constitute a ground to non-suit the petitioner company. This is because, on facts, there is an admitted failure on the part of the first respondent bank to comply with the mandate of the Supreme Court in Harshad Govardhan Sondagar.

The material placed before us manifests that the petitioner company claims leasehold rights under registered lease deed dated 09.04.2009 executed by the second respondent/borrower in its favour, whereunder the lease was for a period of seven years, i.e., from 15.03.2007 to 14.03.2014. It appears that the second respondent/ borrower thereafter executed registered lease deed dated 19.11.2014 in favour of the petitioner company for a further period of seven years, commencing from 14.03.2014.

Though Sri Maruthi Jadhav, learned counsel, would contend that this subsequent lease deed created a fresh lease and the same would be hit by Section 13(13) of the SARFAESI Act in as much as it was executed after issuance of the demand notice dated 28.10.2014 under Section 13(2) thereof, we are of the opinion that this aspect of the matter does not require to be considered by us for the purposes of adjudicating this writ petition.

In para 25 of Harshad Govardhan Sondagar, the Supreme Court held that if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession under Section 14 of the SARFAESI Act. The Supreme Court further held that Section 13 of the SARFAESI Act does not provide that the lease in respect of the secured asset would get determined when the secured creditor decides to take measures thereunder and observed that when a lessee is in possession of the secured asset under a valid lease, possession thereof cannot be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate would not have power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee. The Supreme Court therefore held that when a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under a valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65A of the Transfer of Property Act, 1882, prior to receipt of a notice under Section 13(2) of the SARFAESI Act by the borrower.

In the light of the aforestated mandate of the Supreme Court, the first respondent bank necessarily had to mention in its affidavit filed in support of the application in Crl.M.P.No.1094 of 2017 before the learned Chief Metropolitan Magistrate, Cyberabad at L.B.Nagar, that no lawful tenant was in possession of the secured asset. It was not for the bank to determine as to whether the petitioner company held a lawful lease under the registered lease deeds dated 09.04.2009 and 19.11.2014. Significantly, Crl.M.P.No.1094 of 2017 was filed only on 01.12.2017. This was therefore long after execution of the later registered lease deed dated

19.11.2014. The bank therefore had to disclose the factum of the petitioner company being in possession of the secured asset but, admittedly, it failed to do so.

It is to be noted that in terms of the law laid down by the Supreme Court in Harshad Govardhan Sondagar, it is for the Magistrate who was approached by the bank to put the lessee in possession on notice and examine as to whether it is a lawful lessee.

As such an opportunity was not given to the petitioner company in the case on hand, we set aside the order dated 12.12.2017 passed by the learned Chief Metropolitan Magistrate, Cyberabad at L.B.Nagar, in Crl.M.P.No.1094 of 2017 and remit the matter to the file of the said learned Chief Metropolitan Magistrate for consideration afresh on merits and in accordance with the observations made in Harshad Govardhan Sondagar.

The writ petition is allowed to the extent indicated above.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

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SANJAY KUMAR,J

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D.V.S.S.SOMAYAJULU,J

Date: 13.03.2018
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